DOCKET NO. 22A881
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS BERNARD GASKIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

On April 6, 2023, Gaskin filed, in this Court, a petition for writ of certiorari seeking review of a decision from the Florida Supreme Court in this active warrant case. *Gaskin v. Florida*, 22-723. The petition raises four issues: (1) that his trial counsel failed to present what he calls significant mitigation; (2) that he is entitled to relief under this Court's ruling in *Hurst v. Florida*, 577 U.S. 92 (2016); (3) a claim that the use of an unconstitutionally vague jury instruction, as decided by this Court in *Espinosa v. Florida*, 505 U.S. 1079 (1992), renders his death sentence likewise unconstitutional; (4) the Florida Supreme Court has forsaken its role as the primary forum for litigating constitutional claims. He also filed an application for a stay of execution based on that petition. In his motion for stay of execution,

Gaskin is seeking a stay of execution for this Court to decide his pending petition for writ of certiorari. This Court, however, should simply deny the petition and then deny the stay.

Stays of Execution

Stays of execution are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-4 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgment without undue interference from the federal courts." *Id.* at 584. There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits with requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 6637, 650 (2004). Equity must also consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

This Court recently highlighted the State's and the victims' "important interest" in the timely enforcement of the death sentence. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133-4 (2019). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Id.* at 1134. The Court stated that courts should "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Id.*

Last minute stays of execution should be "the *extreme* exception, not the norm." *Id.* (emphasis added).

To be granted a stay of execution, Gaskin must establish (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal; and (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Gaskin must establish all three factors.

As to the first factor, there is little chance that four justices of this Court would vote to grant certiorari review on any of the three issues.

The *Espinosa* claim is procedurally barred and untimely as it was already rejected by the Florida Supreme Court in 1993. *Gaskin v. State*, 615 So.2d 679 (Fla. 1993). The Florida Supreme Court found that Gaskin failed to challenge the vagueness of the HAC jury instruction at trial, and even if he had, any error was harmless beyond a reasonable doubt. *Gaskin*, 591 So.2d at 920-1. They specifically applied this Court's *Espinosa* holding, they simply decided the issue against him. This Court has already held that such a procedural bar is an independent and adequate state ground for addressing claims under *Espinosa*. See, *Sochor v. Florida*, 504 U.S. 527, 533-4 (1992). They also found that even if he had preserved the issue, any error was harmless as the HAC factor applied to Georgette's murder based on the facts of the case. 591 So.2d at 920-1.

The *Hurst* claim is similarly procedurally barred and untimely as it had been addressed and rejected by the Florida Supreme Court twice previously, holding that

because his case was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, *Hurst* did not apply retroactively to him. *Gaskin*, 218 So.3d 399 (Fla. 2017), *cert denied*, 138 S.Ct. 471 (2017); *Gaskin*, 237 So.3d 928 (Fla. 2018), *cert. denied*, 139 S.Ct. 327 (2018). It is also meritless because even if *Hurst* were to apply retroactively to Gaskin's case, in *State v. Poole*, 297 So.3d 487 (Fla. 2020), the Florida Supreme Court held that *Hurst* required only the unanimous finding of one aggravating factor, not a unanimous recommendation for death. *Id.* at 504. The jury in Gaskin's case did unanimously find two aggravating factors—prior violent felony conviction and committed in the course of a robbery or burglary—when they unanimously voted to convict him of two murders, attempted murder, burglary, and robbery, so his sentence comports with the requirements in *Poole*. There is no conflict between the State Supreme Courts regarding the constitutionality of jury sentencing in capital cases. The Florida Supreme court's recent decision in this case comports with the Nebraska Supreme Court's recent decision. *State v. Trail*, 981 N.W.2d 269, 309 (Neb. 2022) (rejecting a claim that sentencing by a three-judge panel in capital cases violates the Eighth Amendment by relying on the reasoning of *McKinney v. Arizona*, 140 S.Ct. 702 (2020)).

Gaskin's final claim is that Florida's procedural bars to his other claims amount to a "manifest injustice". Other than this bare assertion, Gaskin does not explain how these procedural bars are manifestly unjust in his case. This Court has for centuries recognized that it is limited to rendering judgments on federal questions of law, and the Florida Supreme Court's opinion below rests on well-

settled state law grounds and rules of procedure. *Hayburn's Case*, 2 Dall. 409, 2 U.S. 408, 1 L.Ed. 436 (1792).

Gaskin fails the first factor, which is alone sufficient to deny the motion for a stay.

As to the second factor, there is no significant possibility of reversal on any issue. The first issue is procedurally barred because it involves a claim Gaskin first made back in 1995, and which has been rejected by every court to consider it. While there was additional mitigation his trial counsel could have presented, it would have opened the door to substantial negative information about him that the jury likely would have seen to be aggravating. Given this, every court that has analyzed this claim has determined that his trial counsel made a reasonable strategic decision to put on a limited mitigation presentation that kept that negative information from the jury.

The second issue involves a procedural bar that this Court already found twenty years ago to be an independent and adequate state ground specifically for *Espinosa* claims. Even if this Court looked to the merits, it has also held that there is no error for a trial judge to weigh an impermissibly vague aggravating factor if the state supreme court had properly narrowly construed the statutory language in the past. *Sochor*, 504 U.S. at 535. This Court found that the Florida Supreme Court had limited the use of the HAC factor only to "conscienceless or pitiless crime which is unnecessarily tortuous to the victim," and that finding gave Florida trial courts adequate guidance in applying the factor. *Id.* at 536. This Court's review of Florida

cases found that the Florida Supreme Court had been consistently applying the factor. *Id.* at 536-7. That Court found that HAC applied on direct appeal:

> The facts show that Mrs. Sturmfels knew her husband was being murdered, and that she must have contemplated her own death. She was shot at least twice before crawling down the hall where she watched blood pour from her wounds. She must have been in physical pain and mentally aware of her impending death as Gaskin first disabled her and then stalked her throughout the house.

Gaskin v. State, 591 So.2d 917, 920-1 (Fla. 1991).

There is no significant possibility of reversal on the issue of the Eighth Amendment requiring jury sentencing. In *Spaziano v. Florida*, 468 U.S. 447, 459-61, the Court refused to interpret the Eighth Amendment to require jury sentencing, reasoning that individualized sentencing did not require the jury's participation. *Hurst v. Florida*, 577 U.S. 92 (2016), did not address the Eighth Amendment claim and therefor did overrule that part of *Spaziano*. The *Hurst* Court overruled *Spaziano* only "to the extent" it allowed "a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding." *Hurst*, 577 U.S. at 102. *Spaziano* remains good law in the wake of *Hurst*.

Moreover, this Court recently reaffirmed the view that "States that leave the ultimate life-or-death decision to the judge may continue to do so." *McKinney*, 140 S.Ct. at 708 (quoting Justice Scalia's concurring opinion in *Ring v. Arizona*, 536 U.S. 584, 612 (2002)). While *McKinney* was decided as a matter of the Sixth Amendment right-to-a-jury-trial provision, that is because that is the constitutional provision that actually applies to such a claim. If the Eighth Amendment does not

require jury sentencing, which it does not under this Court's current precedent, then it cannot require unanimous jury sentencing. *Barksdale v. Att'y Gen. of Ala.*, 202 WL 9256555, at *14 (11th Cir. June 29, 2020) (rejecting an Eighth Amendment challenge to Alabama's death penalty scheme because it permitted non-unanimous jury recommendations, relying on *McKinney v. Arizona*, and making this same comment).

His final claim asks this Court to find that procedural bars it has consistently and regularly found to be independent and adequate state grounds for dismissing a claim no longer are adequate or independent. Essentially, he asks this Court to eschew procedural bars in general[.] However, there is nothing unique about how they were applied in this case, and this Court has upheld the same procedural bars in the past. This would be a drastic and extreme departure from this Court's precedent and thus this claim is unlikely to result in reversal.

Gaskin fails the second factor as well.

As to the third factor of irreparable injury, it is a given in capital cases. While the execution will cause irreparable injury, that is the inherent nature of a death sentence. The factors for granting a stay are taken from the standard for granting a stay as applied to normal civil litigation. This factor is not a natural fit in capital cases. There must be more to establish this factor and Gaskin does not provide any unique or special argument in support of this factor. His argument is boilerplate. For that reason, this truism by itself is not a critical factor in consideration of a stay of execution. While the execution means his pending litigation will be rendered

moot, that consideration must be balanced by the fact that Gaskin has had decades to litigate these claims. As the Eleventh Circuit has noted regarding stays of execution, they amount to a commutation of a death sentence to a life sentence for the duration of the stay. *Bowles v. Desantis*, 934 F.3d 1230, 1248 (11th Cir. 2019) (citing *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133-4 (2019)). Without finality, "the criminal law is deprived of much of its deterrent effect." *Calderson v. Thompson*, 523 U.S. 538, 555-6 (1998). And real finality is the execution.

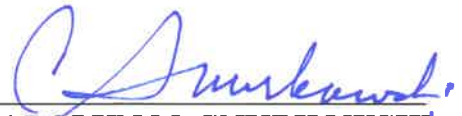
Because Gaskin points to no specific argument in support of this factor, he fails this factor as well.

Conclusion

Gaskin does not meet any of the three factors, or at least does not meet two of the three factors for being granted a stay of execution. Therefore, the motion for a stay of execution should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Florida Bar No. 158541
*Counsel of Record

Patrick Bobek
Assistant Attorney General
Florida Bar No. 112839

Doris Meacham
Senior Attorney General
Florida Bar. 63265

OFFICE OF THE ATTORNEY GENERAL
PL-01 The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
carolyn.snurkowski@myfloridalegal.com
cap.app@myfloridalegal.com